Service Employees International Union, Local 1, AFL–CIO *and* Remzi Jaos. Case 13–CA–41636

July 13, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The single issue presented in this proceeding is whether the Respondent, Service Employees International Union, Local 1, AFL–CIO (the Union), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging its employee, business representative Remzi Jaos, for complaining about and seeking change in the Union's newly-implemented system for assigning work to its business representatives. The judge found that the Union's action did not violate Section 8(a)(1). For the reasons discussed below, we disagree.[1]

I. FACTUAL BACKGROUND

The Union hired Remzi Jaos in 1996 as a business representative. At the time, the Union assigned each business representative to perform a wide variety of representational duties within a specific geographic area. The Union assigned Jaos to represent members employed in residential apartment buildings and condominiums in certain Chicago neighborhoods. Jaos' duties included organizing employees, collecting dues, negotiating contracts, handling grievances, visiting members' places of employment, and educating members on political issues. Jaos successfully carried out his duties for the next 7 years.

In October 2003,[2] the Union implemented a new system for servicing its increasing membership. The new system required each business representative to focus on a particular task rather than a geographic area. This dramatically changed the business representatives' job responsibilities. Under the new system, the business representatives were assigned to one of the following: (1) a telephone center fielding calls from members covering the Union's entire jurisdiction; (2) another telephone center solely responsible for processing grievances referred to it from the main call center; or (3) a field center responsible for visiting members, collecting dues, organizing, and political education. Jaos was assigned to the grievance call-in center, where his primary responsibility was handling grievances arising throughout the Union's jurisdiction. Jaos was dissatisfied with the significant change in his job duties resulting from the new system, but he did not do anything to undermine or interfere with the system's implementation.

However, Jaos actively discussed his concerns with his fellow business representatives. Many of the business representatives shared Jaos' concerns, and also expressed their own complaints regarding the new system, which included confusion about new procedures, insufficient time to complete tasks, and receipt of complaints from members. Jaos suggested that they meet with Union President Thomas Balanoff to discuss their concerns. Several of the business representatives expressed reluctance to meet with President Balanoff, however, for fear of losing their jobs.[3]

On October 13, Jaos alone met with Balanoff and the Union's secretary-treasurer, Chris Andersen. Jaos advised them that he was receiving complaints from members regarding the new system, and that the business representatives needed further training on the new system. Balanoff and Anderson agreed with Jaos' suggestion regarding additional training.

Jaos again met with Balanoff on November 11. Jaos recommended that the Union return to its previous system for servicing members. He also suggested that a meeting be held with all the business representatives to discuss the new system, and that the representatives should have been allowed to vote on the new system.[4]

Balanoff thereafter learned that Jaos had criticized the Union's new system in conversations with Kenneth Munz, Balanoff's special assistant, and Mona Ballinger, the head of the Union's security division. Jaos had told them that he believed Balanoff's motive for implementing the new system was to have the business representatives collect increased political education contributions.[5]

The Union discharged Jaos on November 17. In a formal discharge letter, the Union cited the fact that Jaos had "taken several opportunities" to express to Balanoff and other union officials his "concern and dissatisfaction

[1] On December 28, 2004, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Union filed an answering brief. The Union filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in reply to the Union's answering brief and in answer to the Union's cross-exceptions. The Union filed a revised reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] All dates hereafter are in 2003.

[3] Jaos also discussed these issues with Laura Garza, a supervisor for the business representatives. Garza encouraged Jaos to meet with President Balanoff.

[4] Prior to this meeting, Jaos had entered an elevator with Balanoff, who criticized the way Jaos had answered questions about the new system in a meeting with employers.

[5] The Union maintained a political action committee for which it sought contributions.

with the new system." The discharge letter observed that Jaos opposed the new system. The letter further noted that the new system had been approved by the Union's executive board, and that the Board was not willing to reverse its decision. The discharge letter concluded by accusing Jaos of refusing to assist in the implementation of the new system and by charging him with "disloyalty and insubordination" warranting termination.

II. THE JUDGE'S DECISION

The judge found that the Union lawfully discharged Jaos under the balancing test articulated in *Operating Engineers Local 370*, 341 NLRB No. 114 (2004). In *Operating Engineers Local 370*, the Board held that, where a union-employer discharges a paid employee in a key position for activity that is critical of the union but also protected by Section 7, the employee's right to engage in such activity must be balanced against the union's legitimate interest in ensuring loyalty, support, and cooperation. 341 NLRB No. 114, slip op. at 3–4.

In the present case, the judge found that Jaos' activity regarding the new assignment system was protected by Section 7, and that the Union discharged Jaos because of his protected activity.[6] The judge nevertheless determined that Jaos' discharge did not violate the Act because the Union's legitimate countervailing interest in administering its affairs in the manner it deemed most effective outweighed Jaos' Section 7 rights.

III. DISCUSSION

Although we agree with the judge that the *Operating Engineers Local 370* balancing framework applies here, we find, contrary to the judge, that the balance favors Jaos' Section 7 interest over the Union's interest. We therefore find that the Union violated Section 8(a)(1) as alleged, and we shall provide an appropriate remedy.

A. The Framework: Operating Engineers Local 370

In *Operating Engineers Local 370*, the Board explained that two distinct questions are presented when a union-employer discharges a key paid employee, such as an organizer or business representative, for criticizing the union's policies. The first question is whether the employee engaged in concerted activity that is protected from employer interference by Sections 7 and 8(a)(1) of the Act. If so, the second question is whether the union has a legitimate countervailing interest that outweighs the employee's exercise of his Section 7 rights. As the Board made clear in *Operating Engineers Local 370*, where to appropriately strike the balance between these competing interests depends on the "particular context" of each case. 341 NLRB No. 114, slip op at 4.

In the particular circumstances presented in *Operating Engineers Local 370*, the Board struck that balance in the union's favor. The Board found that the union lawfully discharged one of its organizers, Melvin Thoreson, for relentlessly criticizing to union members and apprentices, the union's policy of relieving employers of their obligation to make pension fund contributions on behalf of probationary apprentices.[7]

The Board assumed, without deciding, that Thoreson had a cognizable Section 7 interest in complaining about the union's policy.[8] However, the Board observed that Thoreson's "arguable" Section 7 interest was not substantial because the contribution waiver did not impact his own working conditions as an employee of the union. Id., slip op. at 4. At the same time, the Board found that the union had a "strong legitimate interest" in having its employees support the contribution waiver policy, which was designed to increase the number of apprentices and union members. Id. In these circumstances, and with particular mention of the extensiveness of Thoreson's criticism of the union's policy, the Board concluded that any arguable Section 7 interest belonging to Thoreson was outweighed by the union's strong legitimate interest in ensuring that its employees loyally supported its policies. Id. Accordingly, the Board held that the union's discharge of Thoreson did not violate the Act.

B. Jaos' Section 7 Interests Outweigh the Union's Interests in the Circumstances Presented Here

Contrary to the judge, we find that the particular circumstances here lead to a different result from that reached in *Operating Engineers Local 370*. Initially, we affirm the judge's finding that Jaos engaged in Section 7 activity. As described, the Union's new system for representing members dramatically changed the business representatives' daily job functions. Jaos' attempt to initiate or induce group action among his coworkers to confront the Union (their employer) about their shared concerns over the changes clearly constituted concerted

[6] The judge cited, among other things, the terms of the discharge letter and Balanoff's testimony that Jaos' criticism of the Union's motive for instituting the new system precipitated his discharge. The judge additionally found that the Union failed to show that it would have discharged Jaos absent his protected activity, rejecting the Union's contention that Jaos failed to fulfill his duties under the new system. The judge found no evidence "that Jaos did anything to undermine or interfere with the implementation of the new call center system."

[7] See 341 NLRB No. 114, slip op. at 4 (organizer Thoreson "persistently criticized" union policy when teaching courses to apprentices and to members at union meetings; his "uncooperative behavior reached a crescendo" at a union meeting where he profanely "launched additional attacks" on the union policy).

[8] The Board observed that, to the extent that Thoreson's conduct "might be described as making common cause, as an employee, with the apprentices, his efforts were not directed toward the apprentices' employers, but toward the policies of their bargaining representative, which happened to be his employer." *Operating Engineers Local 370*, supra, slip op. at 4.

activity protected by Section 7 of the Act.[9] Likewise, Jaos engaged in Section 7 activity when he subsequently raised these shared concerns with Union President Balanoff[10] in an effort to have the Union reconsider the new system.[11]

In determining whether Jaos' Section 7 interest was outweighed by the Union's interest, we regard two considerations to be particularly significant. First, Jaos' Section 7 interest was more compelling than Thoreson's "arguable" Section 7 interest in *Operating Engineers Local 370.* Jaos engaged in classic protected concerted activity: he attempted to band together with his coworkers to improve their daily working conditions. In contrast, Thoreson insisted on a change in the union's collective-bargaining policy that had no impact on Thoreson's and his fellow organizers' working conditions.[12] Although Thoreson's activity was arguably protected by Section 7, we find that Jaos' bedrock Section 7 activity merits greater weight in the *Operating Engineers Local 370* balancing analysis.

Second, while the Union has a legitimate interest in assuring its business representatives' loyal support of its policies, Jaos' activity was much less likely, compared to Thoreson's activity, to impair this interest. As described, even though Jaos complained about the Union's new system, the judge specifically found no evidence that "Jaos did anything to undermine or interfere with [its] implementation." The record fully supports the judge's finding. Thus, Jaos' efforts to have the Union reconsider the system were limited to in-house discussions with his fellow business representatives and with union officials. In contrast, Thoreson repeatedly aired his criticism of the union's contribution waiver policy during union membership meetings. As the *Operating Engineers Local 370* judge correctly recognized, a union's "customers are its members," and, during these meetings, Thoreson "was telling [them] that its leadership was doing a bad job of providing employee representation." 341 NLRB No. 114, slip op. at 9. Plainly, as compared to Thoreson's broadly-disseminated complaints in *Operating Engineers Local 370*, Jaos' circumscribed activity was less likely to undermine the Union's legitimate interest.[13] As a result, we find that the Union's interest commands less weight in the balancing required by *Operating Engineers Local 370*.

These circumstances lead us to conclude that the balance of interests favors business representative Remzi Jaos. We find that his strong Section 7 interest in protesting his and his colleagues' working conditions was not outweighed by the Union's legitimate interest in the cooperation of its employees with its policies. Accordingly, we find that the Union violated Section 8(a)(1) of the Act by discharging Jaos because of his Section 7 activity.[14]

ORDER

The National Labor Relations Board orders that the Respondent, Service Employees International Union, Local 1, AFL–CIO, Chicago, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they concertedly complained about their wages, hours, and working conditions by requesting changes to the manner in which work assignments are made to employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Remzi Jaos full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Remzi Jaos whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

[9] See, e.g., *Meyers Industries*, 281 NLRB 882, 887 (1986) (concerted activity encompasses circumstances where individual employees seek to initiate or induce or prepare for group action), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); *Whittaker Corp.*, 289 NLRB 933 (1988) (same).

[10] The record fully supports the judge's finding that Union President Balanoff knew of the concerted nature of Jaos' complaints.

[11] See *Meyers Industries*, supra, 281 NLRB at 887 (that an employee action inures to the benefit of all is proof that the action comes within the "mutual aid or protection" clause of Sec. 7), citing *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

[12] Indeed, in *Finnegan v. Leu*, 456 U.S. 431 (1982), the Supreme Court case upon which the Board relied in *Operating Engineers Local 370*, the Court stressed the importance of elected union officials securing the loyalty of their employees regarding policies that affect the membership. Accordingly, our accordance of more weight to the union's interest in *Operating Engineers Local 370*, than the Union's interest here, based on the closeness of the issue to the members' interest versus the employees' interest is consistent with the foundation upon which the *Operating Engineers Local 370* principle is based.

[13] The Union asserts that Jaos, in a meeting introducing the new system to employers, contradicted his supervisor's description of a procedure involving the new call center. Jaos denied this allegation at the hearing. In any event, even assuming this single incident occurred, we find that it simply does not compare to Thoreson's wide-ranging criticisms of union policy in *Operating Engineers Local 370*.

[14] The record supports the judge's finding that the Union failed to show that it would have discharged Jaos absent his protected activity. The Union failed to produce evidence that Jaos engaged in any conduct—other than his protected concerted complaints about the new assignment system—for which it would have discharged him.

with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Remzi Jaos, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its office in Chicago, Illinois, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 17, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 13, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discipline you because you concertedly complained about your wages, hours, and working conditions by requesting changes to the manner in which your work assignments are made.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Remzi Jaos full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Remzi Jaos whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge of Remzi Jaos, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, AFL-CIO

Denise R. Jackson-Riley, Esq., for the General Counsel.
Marvin Gittler, Esq. (Asher, Gittler, Greenfield & D'Alba, Ltd.), Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 20, 2004. Remzi Jaos filed a charge on January 20, 2004 alleging that Respondent, the Service Employees International Union (SEIU), Local 1, engaged in an unfair labor practice by terminating his employ-

ment as a business representative/organizer on November 17, 2003. Based on this charge, the General Counsel issued a complaint on March 4, 2004, alleging that Respondent violated Section 8(a)(1) of the Act by discharging Jaos for concertedly complaining to Respondent about the working conditions of Respondent's employees and requesting changes to the manner in which work assignments were being made.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an unincorporated association, is a labor organization, and represents approximately 40,000 employees, including janitors, building engineers, doormen and security guards, in collective bargaining. Its principal office is in Chicago, Illinois. During 2003 and 2004 Respondent collected dues and/or initiation fees in excess of $50,000 from its members and remitted in excess of $50,000 of dues and/or initiation fees from its Chicago office to the international union in Washington, D.C. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Remzi Jaos, a member of SEIU Local 1, was hired by the Union in 1996 as a business representative/organizer. Until October 2003, his job entailed representing SEIU members employed in residential apartments and condominiums. In doing so, Jaos performed a variety of tasks including organizing, political education, grievance handling, visiting members at their place of employment, collecting dues and initiation fees and negotiating contracts. He performed his tasks within a specific geographic area of Chicago to which he was assigned.

In October 2002, Union President Thomas Balanoff appointed a committee to study the Union's method of servicing its members. In October 2003, the Union implemented the committee's recommendations, which called for the centralization of certain functions in a call center and a much more specialized role for its business representatives. Under the new system, five business representatives were assigned to the call center, which was to receive all telephone calls from members and employers throughout the Union's jurisdiction, which covers the Chicago metropolitan area, St. Louis, Kansas City, and the State of Wisconsin. This call center disposes of 65 percent of the incoming calls and refers the other 35 percent to a grievance center staffed by eight business representatives. These representatives' sole responsibility is the processing of grievances. Another 15 business representatives were assigned to a field center. The tasks of the field center representatives include organizing, dues collection, member visits, and political education.

The Union assigned Remzi Jaos to the grievance center. Jaos was not happy with the change in the scope of his responsibility. Jaos, the General Counsel's only witness, testified that he discussed his concerns about the new system with a number of other employees and suggested to some that they meet with the Union's president, Thomas Balanoff, to discuss these concerns. Since this testimony is uncontradicted, I credit it.

Jaos told Business Representative Anton Farby that he was getting a lot of complaints about the new system. Farby replied that he was getting a lot of complaints also and that he didn't think the new system was working well. Farby also commented that he was confused as to what he was supposed to do regarding completing field assignments received before the change and processing new grievances.

In a second conversation, Farby agreed with Jaos that they should meet with Union President Tom Balanoff about the new call center system. Farby and Jaos agreed that the new system was very "labor intensive" and that there was insufficient time for the representatives to type closure letters for each of the grievances referred to them. Another business representative, Ted Williams, indicated agreement.

Business Representative Lionel Saffold, who had been on the committee which had recommended the new centralized system, complained to Jaos about the difficulty in handling new calls and following up on old grievances in the field. When Jaos suggested they meet with Balanoff and the Union's secretary-treasurer, Chris Andersen, Saffold declined, saying that he didn't want to lose his job.

Representatives Dariuz Kozinski and Robert Pawlaszek also discussed the new system with Jaos and complained about it. However, when Jaos suggested they take their complaints to Balanoff, both were unwilling to do so. Pawlaszek also told Jaos he was afraid of losing his job.

Jaos also discussed his unhappiness with the new system with Rick Owsiany, the head of the new grievance center and Laura Garza, the supervisor of the representatives for industrial janitors. Garza indicated agreement with his criticisms of the system and encouraged Jaos to set up a meeting with Balanoff.

Additionally, Jaos told Kenneth Munz, an assistant to Union President Balanoff, that he was getting complaints from members regarding the system and suggested a meeting with Balanoff. Jaos met with Balanoff and Andersen on October 13, and told them that he was getting complaints about the new system from members and that further training was needed for some of the representatives. Balanoff and Andersen agreed with Jaos' suggestions regarding training.

On November 11, 2003, as he arrived at work, Jaos entered an elevator with Balanoff. According to Jaos, Balanoff criticized Jaos and his immediate supervisor, Carl Riconi, for their handling of a question about the call center at a meeting with representatives of ABOMA, an association of residential apartment employers. Balanoff testified he chastised Jaos for contradicting Riconi in front of the ABOMA representatives.[1]

Jaos called Balanoff's secretary and set up a meeting in the latter's office 2 hours later. At this meeting, Jaos recommended to Balanoff that the Union go back to its previous system or something close to it. He asked that representatives be assigned to a specific geographic area in which they would perform a variety of functions. Jaos testified that he suggested a meeting with all the business representatives to discuss the new system and that Balanoff agreed.

[1] Jaos denies contradicting Riconi.

Balanoff testified that at first Jaos asserted that a number of union members had problems with the new system. However, according to Balanoff, when he asked Jaos for the names of such members, Jaos said that it was building managers who were critical of the system. However, Balanoff also testified that Jaos told him that Balanoff should have let the business representatives vote on the new system. Balanoff testified that he replied by noting that the new system been approved by the Union's executive board, which was elected by the membership.

Six days later, on November 17, 2003, Balanoff summoned Jaos to his office and handed him a termination letter (GC Exh. 3). Jaos' termination letter stated:

> You have taken several opportunities to express to me and other officers your concern and dissatisfaction with the new system. Your complaints and suggestions were noted, but not accepted.
>
> On November 11th you and I met at your request wherein you raised complaints about the program, insisted the previous system was effective, and proposed a change that for all intents and purposes would dismantle the reorganization.
>
> At that point, I explained to you the reasons why the executive board adopted this very important program to service Local 1 members, and that the executive board is not willing to reverse the reorganization that is in place. It is apparent you are having great difficulty working within the new system and that you oppose it.
>
> Your unwillingness to assist in the implementation of our program is clearly designed to undermine our efforts to properly serve the members, and is further designed to reverse the executive board's decision to reorganize and restructure the way the union provides services to its members.
>
> Your refusal to participate and assist in the efficient implementation of this program interferes with our efforts to develop innovative and important member service programs, and constitutes disloyalty and insubordination.
>
> These actions cannot be tolerated and your continued employment is contrary to the interests of our union.
>
> Effective immediately, your employment with SEIU Local 1 is terminated.

Balanoff testified that between his November 11 meeting with Jaos and presenting the termination letter to Jaos on November 17, he learned that that Jaos had criticized the new call center in conversations with Mona Ballinger, the head of Respondent's security division, and Balanoff's special assistant, Kenneth Munz. Balanoff was told that Jaos, "basically, trashed the system, said it was only about Tom Balanoff wanting people, . . . reps to go out and collect COPE [political education] money" (Tr. 230).

Balanoff further testified that learning of these conversations "reinforced my distrust, at this point, in Mr. Jaos' continuing to work in this system (Tr. 231)." I infer from this testimony that when Balanoff learned that Jaos was telling people in the Union that Balanoff instituted the new call center system primarily, if not exclusively, to increase contributions to COPE, that this information precipitated Balanoff's decision to terminate Jaos.

There is no credible evidence that Jaos did anything to undermine or interfere with the implementation of the new call center system other than complain about it, question the motivation for its implementation and attempt to gain the support of other business representatives in seeking to have the Union's management reverse course.

Analysis

For the reasons that follow, I conclude that Respondent terminated Remzi Jaos for engaging in concerted activity that is generally protected by the Act. However, I also conclude that Respondent did not violate Section 8(a)(1) because its legitimate countervailing interests outweigh Jaos' Section 7 rights.

In order to prove a violation of Section 8(a)(3) or (1), the General Counsel must establish that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel generally must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[2] Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *Gary Enterprises*, 300 NLRB 1111 (1990).

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . (emphasis added)."

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683, 685 (3d Cir. 1964). The fact that an employee is unsuccessful in persuading fellow employees to protest their wages, hours or working conditions is immaterial in assessing whether an appeal to coworkers is "concerted," *El Gran Combo*, 284 NLRB 1115, 1117 (1987).

In the absence of any contrary evidence, I credit Jaos' testimony that he spoke to several coworkers in order to persuade

[2] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

them to meet with Union President Balanoff with the object of at least modifying their working conditions in the new call center system. Thus, I find that Jaos engaged in protected concerted activity.

Nevertheless, Respondent argues at page 27 of its brief, Jaos conduct was not protected because his activities were not seeking "mutual aid or protection," citing the recent Board decision in *Holding Press, Inc.*, 343 NLRB No. 45 (2004). I conclude otherwise. Unlike *Holding Press*, other employees expressed reservations about the call center system in their discussions with Jaos. Moreover, Joas' uncontradicted testimony establishes that he sought to initiate group action to address these reservations with union management.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity. Based on Jaos' testimony that, on November 11, he suggested that Balanoff meet with the business representatives and Balanoff's testimony (Tr. 228–230) that Jaos stated that Balanoff should have let the Union's staff vote on the new system before implementing it, I find that Respondent was aware of the concerted nature of Jaos' complaints, and the fact that Jaos sought to address concerns of business representatives other than himself.

I find that Respondent terminated Remzi Jaos for his persistent complaints and criticism of the new call center system, his lobbying for a return to the old system, his activities to enlist other union employees in this effort and rendering his opinion as to Balanoff's motives for implementing the new system.

Although Respondent introduced evidence regarding two instances in which Jaos was counseled for failing to call members back in a timely manner, it did not rely on any alleged misconduct in terminating Jaos. Respondent also alleged that Jaos contradicted his supervisor in front of employer representatives. It also suggests, based on his casual remark to Ken Munz that members didn't know about the new system (Tr. 195), that Jaos was less than diligent in distributing flyers that informed union members about the call center. Respondent did not specifically mention these factors in its termination letter and I conclude that, even if Respondent had a good-faith belief regarding these matters, they did not contribute to the termination decision.

I credit Thomas Balanoff's testimony at transcript pages 230–231 and conclude that the decision to terminate Jaos was precipitated by Balanoff's learning, between November 11, and 17, 2003, that Jaos told Munz and Ballinger that Balanoff's sole motive for instituting the call center was to increase political contributions. Although other representatives made general complaints about the new system, there is no evidence that anyone but Jaos voiced his opinion concerning the heightened emphasis on COPE, or that Jaos made such an assertion in discussions with other union employees.

I conclude that the General Counsel has established that Respondent terminated Jaos at least in part for protected concerted activity. Assuming that Jaos' statements to Munz and Ballinger regarding Balanoff's motives can be distinguished from his protected activities, Respondent has not shown that it would have terminated Jaos even if he had not engaged in protected activity. Moreover, nothing that Jaos did or said in trying to get the Union to scrap the call center system forfeited his protection under the Act. More specifically, Jaos' remarks which questioned Balanoff's motives for instituting the new call center system were not sufficiently flagrant, violent or extreme as to negate their protected nature, *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975). Outside the context of a labor organization, I would analogize Jaos' remarks to those of an employee questioning whether a particular management official was more interested in his or her personal advancement than with the performance of the employer's business. I would not regard such remarks to be unprotected if they otherwise constituted protected concerted activity within the meaning of Section 7.

Nevertheless, Respondent argues that it was entitled to discharge Jaos on the grounds that it had a legitimate countervailing interest that outweighs Jaos' Section 7 rights. Citing *Operating Engineers Local 370*, 341 NLRB No. 114 (2004), Respondent contends that it has a right to demand cooperation from its paid employees and appointed representatives, and may discharge those who are hostile to or in disagreement with the leadership of the Union in the interest of promoting internal unity. The *Local 370* case is distinguishable from the instant case in that the matters therein, for which Operating Engineers Local 370 fired organizer Melvin Thoreson, had no impact on Thoreson's working conditions. Thoreson repeatedly criticized Local 370 for allowing employers to cease making pension fund contributions on behalf of probationary apprentices. Since Thoreson was not an apprentice, "the contribution waiver had no impact on his own working conditions as an employee of the Local," (Id. at slip op. 4). In the instant case the implementation of the new call center had a profound impact on the working conditions of Jaos and other business representatives, in that it materially changed the nature of their duties and daily work activities.

Despite this distinction there remains an open question under *Local 370* and two United States Supreme Court cases as to whether Respondent's right to demand cooperation from its paid employees outweighs Remzi Jaos' Section 7 rights. In *Local 370*, the Board observed, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), that the Board and the courts may balance employees' Section 7 rights with their employer's countervailing interests. The Board then analyzed Local 370's countervailing interests by discussing cases in which courts and the Board have recognized a labor organization's legitimate interest in speaking with one voice and in internal unity.

The Board began it analysis by discussing *Finnegan v. Leu*, 456 U.S. 431, 102 S. Ct. 1867 (1982). In that case, the Supreme Court held that a union did not violate the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 et seq. when the victorious candidate for president of Teamster Local 20 discharged business representatives who had been appointed by his opponent several years previously. Chief Justice Burger writing for the Court opined that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own."

Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an

integral part of ensuring a union administration's responsiveness to the mandate of a union election. 456 U.S. at 441.[3]

Relying on *Finnegan v. Leu* and several Board cases arising under Section 8(b)(1)(A),[4] the Board opined that "Local 370 could legitimately demand the loyal service and cooperation of Local 370's employees in important positions like Thoreson's in the implementation of its policies," *Local 370*, supra (slip op. at 3). It also opined that, "Local 370 had a legitimate interest in the support of its key paid employees for its contribution waiver policy. Therefore, it had legitimate and substantial reasons to be hostile to Thoreson for his relentless attacks on that policy," Id. (slip op. at 4).

The Board then proceeded to weigh Local 370's interests against Thoreson's Section 7 interests in criticizing the Local's concessions made at the expense of the apprentices. It found that the Local's legitimate interests outweighed Thoreson's Section 7 rights.

Implicitly, the Board recognizes that an employer which is a labor organization has legitimate interests in loyalty and internal unity that are different than those of employers who are not labor organizations. Given the fact that Balanoff is the elected president of the Respondent Union and that Remzi Jaos was an appointed business representative, I conclude that the Union's interest in having employees who support the policies of the elected leadership outweighs Jaos' Section 7 rights. In *Finnegan v. Leu*, supra, the Supreme Court held that an elected union leader may choose staff whose views are compatible with his or her own. Similarly, I conclude that an elected union leader may chose to retain only those appointed staff members sympathetic to his or her policies. Moreover, such an official may make such personnel decisions regardless of whether the appointed staff members have concertedly protested the elected official's policy decisions, even if the concerted protest involves the staff members' working conditions, which do not outweigh legitimate interests of the union.

The instant case essentially involves balancing the union's interest in implementing a markedly different way of servicing its members with Remzi Jaos' interest, albeit discussed with other representatives, in performing his job in the same manner as he had in the past. I find the interests of the elected union leadership in administering the union in a manner which they deem most effective, outweighs Jaos' interest in retaining the job duties he deems most satisfactory, challenging or rewarding. Therefore, I conclude that Respondent did not violate Section 8(a)(1) in terminating the employment of Remzi Jaos.

CONCLUSION OF LAW

Respondent did not violate Section 8(a)(1) of the Act in discharging Remzi Jaos for engaging in protected concerted activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

---

[3] In *Sheet Metal Workers' International Association v. Lynn*, 488 U.S. 347, 109 S. Ct. 639 (1989), the Court held that a union could not discharge an elected union business agent for opposing a dues increase proposed by a trustee appointed by the International Union. The Court found that the discharge violated the LMRDA because it was inconsistent with the Act's objectives in promoting union democracy.

[4] *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118 (2000), and *Shenango, Inc.*, 237 NLRB 1355 (1978).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.